Supreme Court, U.S.

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No.

In the

# Supreme Court of the United States

IRIS C. WOOD.
Petitioner.

vs.

JAMES BILLINGTON, LIBRARIAN OF CONGRESS,
Respondent.

*On Petition For Writ Of Certiorari*
*To United States Court of Appeals for the*
*District of Columbia Circuit*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No 055301** **September Term, 2005**
**O3cv01343**
**Filed On: March 13, 2006 [955520]**

**Iris Croft Wood, *Appellant***
**V.**
**James Billington, Librarian of Congress and United States of America, *Appellees***

**BEFORE: Randolph, Tatel, and Brown, Circuit Judges**

**ORDER**

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

**ORDERED that the motion be granted**. The merits of the parties' positions are so clear as to warrant summary action. *See* Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir.1987) (per curiam). Summary judgment was proper as to appellant's claims of sex discrimination, disability discrimination, and retaliation, because appellant has not demonstrated that the proffered reasons for appellee's actions were pretextual, and that a reasonable trier of fact could infer intentional discrimination based on the evidence. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Tenyenckck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004). Further, appellant is not entitled to relief on her property interest claims because she has not demonstrated that she could be discharged only for cause. *See* Gilbert v. Homar, 520 U.S. 924, 928-29 (1997). Finally, appellant is not entitled to relief on her liberty interest claim because she has neither alleged nor presented evidence to establish that the appellee has publicized information tending

to stigmatize her. *See* Hutchinson v CIA. 393 F 3d 226, 231 (D. C. Cir 2005); Orange v Dist. of Columbia 59 F.3d 1267, 1274 (D.C. Cir. 1995).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **IRIS CROFT WOOD,** | : | |
| ***Plaintiff,*** | : | **Civil Action No.: 03-1343** |
| **v.** | : | **Document Nos.: 33, 34** |
| **JAMES BILLINGTON,** | : | |
| **Librarian of Congress *et al.*,** | : | |
| ***Defendants.*** | : | |

**MEMORANDUM OPINION**
**GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

This case comes before the court on the defendants' motion for summary judgment and the plaintiff's motion for summary judgment. The plaintiff, a female former attorney in the Library of Congress' Office of the General Counsel, brings suit under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Fifth Amendment of the United States Constitution. Specifically, the plaintiff alleges that the defendants discriminated against her based on her sex and perceived mental disability, retaliated against her for engaging in protected activity and violated her Fifth Amendment rights by delaying the effecting of an appealable action and discharging her without due process. Because the plaintiff fails to establish that the defendants' reasons for suspending and terminating her were based on discriminatory animus and fails to establish a constitutionally protected property interest in her employment, the court grants the defendants' motion for summary judgment and denies the plaintiff's motion for summary judgment.

## II. BACKGROUND

The plaintiff began working at the Library of Congress ("the Library") in June of 1991 when she was hired as a GS-12 attorney in the Office of General Counsel. Defs.' Statement of Undisputed Material Facts ("Defs.' Stat.") ¶ 1. [1] John Kominski, the Library's general counsel, hired the plaintiff and assigned to her work under the supervision of Assistant General Counsel Robert Lincoln. *Id.* ¶ *5.* In October of 1992, Mr. Lincoln gave the plaintiff a "satisfactory" performance evaluation. Defs. Stat. ¶ 5. Apparently angered by this evaluation, the plaintiff requested that Mr. Lincoln no longer supervise her. *Id.* ¶ *6*; Pl.'s Opp'n, Ex. 2 ("Wood Decl.") ¶ *3.* Consequently, Mr. Kominiski became the plaintiff's direct supervisor. Defs Stat. ¶ *7*; Wood Decl. ¶ 3. On June 2, 1993, the plaintiff filed an Equal Employment Opportunity ("EEO") complaint against Mr. Kominiski. Defs. Stat. ¶ 8. The complaint alleged sexual harassment, discrimination based upon sex, physical and mental handicap, denial of adequate office space, failure to timely promote and failure to reasonably accommodate. *Id.*

In October of 1993, the plaintiff underwent orthopedic surgery. Defs.' Stat. ¶ 11, Pl.'s Statement of Material Facts in Dispute ("Pl.'s Stat.) ¶ 11. Prior to the surgery, the plaintiff contacted Dr. Sandra Charles, the Library's Health Services Officer, seeking a larger office so that she could reorganize her work materials, minimize the need to stand and carry materials after the surgery and provide a large enough space to elevate her foot. Pl.'s Stat. ¶ 11. Dr. Charles, however, did not recommend that the plaintiff be provided with a larger

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[1] The plaintiff filed a paragraph by paragraph response to the defendants' statement of undisputed material facts. While the plaintiff purports to dispute many of the defendants' facts, many "disputed facts" merely consist of the plaintiff's subjective interpretation of historical occurrences or additional facts that the plaintiff believes add context to the defendants' recitation. Unless a genuine material factual dispute exists, the court cites to the Defendants' Statement.

office space. Defs.' Stat. ¶ 13. On October 20, 1993, Dr. Charles reported feeling threatened by the plaintiff's behavior in a parking lot. *Id.* ¶ 16. Dr. Charles stated that she was in the Library's parking garage when the plaintiff had driven up to Dr. Charles in a rapid manner, but stopped short of running into the side of her car. *Id.* Dr. Charles also reported that the plaintiff was gripping the steering wheel tightly, clenched her teeth and had her eyes squinted in a hard glaze. *Id.* The plaintiff simply denies that she ever made any threatening gestures towards Dr. Charles. Pl.'s Stat. ¶ 16.

On December 23, 1993, the plaintiff and her personal representative met with Brad Weiss, a mediator with the Library's Dispute Resolution Center ("DRC"), in an attempt to informally resolve the plaintiff's June 2, 1993 EEO complaint. Defs.' Stat. 18; Pl.'s Opp'n, Ex. 3 at 539. At the mediation, Mr. Weiss informed the plaintiff that Mr. Kominski offered to resolve her complaint by transferring her to another position in the Library. Defs.' Stat. ¶ 19. While Mr. Kominski asserts that the relocation offer provided for the plaintiff to remain employed as an assistant general counsel, the plaintiff believed that the transfer would be to a non-legal, administrative position. Defs.' Stat. ¶ 19; Pl.'s Stat. 19. Upon hearing the offer, the plaintiff became upset. Defs. Stat. ¶ 20; Pl.'s Stat. ¶ 20. Although the plaintiff disputes the extent of her anger, Mr. Weiss stated that the plaintiff became hysterical, was "shrieking and screaming," slammed her legal pad and body against the walls of his office and graphically described "cutting off her supervisior's head and putting it on a plate[.]" Dep. of Brad Weiss ("Weiss Dep.") (Attached to Defs.'s Mot. For Summ. J.) at 37-58; Dep. of Iris Wood ("Wood Dep.') (Attached to Defs.' Mot. For Summ. J.) at 89-93.

On February 3, 1994, a panel consisting of: (1) Mr. Kominski; (2) Dr. Charles; (3) Dr. Rodney Burbach, a consultant in psychiatry; and (4) Barbara Young, Chief of the

Employee Assistance Division, unanimously concurred that the plaintiff's behavior warranted a fitness-for-duty ("FFD") examination. Defs.' Stat. ¶ 23. On February 23, 1994, the Library's Human Resources Department notified the plaintiff that she would have to take a FFD examination and that she was required to call a psychiatrist selected by the Library by February 28, 1994, to setup an appointment. Defs.' Mot., Ex. 13. The Human Resources Department further informed the plaintiff that if she desired, she could submit her own list of three doctors by February 28, 1994, from which the Library would select one to perform the exam. *Id.* Human Resources informed the plaintiff that failure to take the exam or abide by the stated deadlines could result in a proposal that she be removed for insubordination. *Id.*

The plaintiff responded with a list of three alternative psychiatrists. Defs.' Stat. ¶ 26. From this list, the Library selected Dr. Martin Allen and instructed the plaintiff to contact Dr. Allen by April 1, 1994. *Id.* The plaintiff did not contact Dr. Allen by April 1, 1994, however, the plaintiff argues that she did not schedule an appointment because she did not receive background materials that she was entitled to review prior to the examination. Pl.'s Stat. ¶ 26. In response, on May 6, 1994, the Library provided copies of the documents that served as the basis for the FFD examination to the plaintiff's personal physician and directed the plaintiff to contact Dr. Allen by May 27, 1994. Defs.' Mot., Ex. 16. On May 13, 1994, the plaintiff filed a second EEO complaint alleging that Mr. Kominski continued to, *inter alia,* discriminate against her and sexually harass her. Defs.' Stat. ¶ 27. On June 9, 1994, the Library sent a letter to the plaintiff noting that she had failed to contact Dr. Allen by the required date, and giving her five days to explain why she had not done so. Defs.' Stat ¶ 29. The plaintiff claimed that she did not contact Dr. Allen by May 27, 1994, because she did not timely receive her background materials and that she had been traveling for "work related training and other matters"

during May. Pl.'s Stat. ¶ 28. The Library then scheduled a FFD examination for the plaintiff with Dr. Allen for July 11, 1994. Defs.' Stat. ¶ 30. After another delay due to the plaintiff's request for emergency leave, Dr. Allen examined the plaintiff on July 28, 1994. *Id.* ¶ 31.

Upon completion of his examination, Dr. Allen referred the plaintiff to a psychologist, Dr. Richard Filson, for further examination. *Id.* ¶ 32. The plaintiff, however, objected to further psychological testing, arguing that further tests were unnecessary and would not reveal probative information. *Id* ¶ 32-33. Ultimately, on October 7, 1994 the plaintiff called Dr. Filson to set up an appointment. In the course of leaving a voicemail, the plaintiff informed Dr. Filson that she considered any examination of her to be "psychological rape" and threatened to report Dr. Filson to the American Psychological Association. *Id.* ¶ 34. Subsequently, both Dr. Alien and Dr. Filson refused to continue evaluating the plaintiff because of threats the plaintiff made regarding legal action against Drs. Allen and Filson. *Id.* ¶ 34; Dep. of Dr. Martin Allen ("Allen Dep.") (attached to Defs.' Mot. for Summ. J.) at 35-36.

On January 23, 1995, the plaintiff filed a third EEO complaint reiterating earlier allegations against Mr. Kominski. Defs.' Stat. at 37. On February 8, 1995, the Library informed the plaintiff that in light of Drs. Allen and Filson's refusal to examine the plaintiff further, the Library would resume its administrative action against the plaintiff. *Id.* ¶ *35.* One week later, on February 15, 1995, Drs. Charles and Burbach concluded that after reviewing all available documentation, the plaintiff posed an unacceptable risk to the workplace. *Id.* ¶ 36. That same day, the Library informed the plaintiff that she had been placed on immediate administrative leave, and after exhaustion of leave time, would be indefinitely suspended without pay. *Id.* ¶ 38. In response, on March 23, 1995, the plaintiff filed her final EEO complaint.

*Id.* ¶ 39. The complainant alleged that her placement on enforced leave and suspension, debarment from Library premises and proposed removal were based on gender discrimination and perceived mental handicap discrimination. *Id.*

On June 21, 1995, Hiram L. Davis, the Deputy Librarian of Congress at the time, heard the plaintiff's appeal regarding her enforced leave. Defs.' Stat., Ex. 30. In dismissing the plaintiff's appeal, Mr. Davis determined that the medical evidence supported a conclusion that the plaintiff may have been an unacceptable safety risk to others in the workplace, was a detriment to Library operations and that the Library's decision to place her on enforced leave was appropriate. *Id.* Mr. Davis further concluded that because information in the record suggested that the plaintiff's return to duty could be a threat to safety and/or a disruption to Library operations, the plaintiff would have to retake a FFD exam and could not return to work until she completed the examination and was cleared to return to work. *Id.* Mr. Davis noted that resubmitting to a FFD exam was mandatory and that the plaintiff's failure to cooperate in the process could result in removal from her position. *Id.*

As part of the renewed FFD process, the plaintiff submitted a list of three psychiatrists to examine her, from which the Library chose Dr. Susan Fiester. *Id.* ¶ 42. On October 5, 1995, the plaintiff appeared for her examination by Dr. Fiester. However, during the examination, the plaintiff again asserted that Dr. Fiester was violating her civil rights under the ADA and violating the ethics of the American Psychiatric Association. *Id.* ¶ 43. Dr. Fiester perceived the plaintiff's comments as veiled threats of litigation and decided to terminate the session. *Id.*

On February 27, 1996, the plaintiff notified the Library that she would not threaten legal action or report any

physician to a professional body for participating in the Library's FFD process. *Id.* ¶ 44. On June *25,* 1996, the Library directed the plaintiff to undergo an examination by Medical Quality Management ("MQM"), an organization specializing in conducting medical evaluations. *Id.* On July 11, 1996, the plaintiff notified the Library that she objected to MQM performing the FFD examinations because it had requested the plaintiff to provide written assurances that she would not take legal action against MQM for conducting the evaluation and submitting their findings to the Library and because of an alleged conflict of interest. *Id.* ¶ 45; Pl.'s Stat. ¶ 45. In response to the plaintiff's refusal to undergo an examination by MQM, the Library concluded that further efforts to have the plaintiff submit to a FFD examination would be futile and on August 20, 1996, re-instituted administrative actions to remove the plaintiff from her Library service. Defs.' Stat. ¶ 46.

From August of 1996 through October 2, 1998, the plaintiff remained on enforced leave. *Id.* ¶ 47. The Library alleges that during this period, the parties were engaged in efforts to settle the plaintiff's various complaints. *Id* The plaintiff characterizes this time as a period of "limbo" where she could not appeal a final agency action. Pl.'s Stat. ¶ 47. After notifying the plaintiff of its proposal to remove the plaintiff from Library employment, the Library appointed a reply officer to receive oral and written statements from the plaintiff and other Library employees, review the statements in light of the proposed removal and make a recommendation to the Library deciding official. Defs.' Stat. ¶ 49. The reply officer recommended that the Library deciding officer uphold the plaintiff's removal and the Library's deciding officer concurred, concluding that the plaintiff's removal was warranted. *Id.* ¶11 50-51.

On November 3, 1999, the plaintiff appealed the deciding officer's decision to uphold removal. *Id.* ¶ 52. A

hearing examiner heard the plaintiff's appeal and concluded that the plaintiff's behavior warranted the Library's initiation of the FFD process and that the plaintiff had failed to cooperate in the FFD process. Defs.' Stat., Ex. 41. But, the hearing examiner also concluded that the plaintiff did not pose a risk to the workplace. *Id.* The hearing examiner recommended that the plaintiff be reinstated to her position and receive three years of back pay and benefits. *Id.* Finally, on June 21, 2001, Deputy Librarian of Congress Donald Scott, the final decision maker in adverse action appeals agreed with the hearing examiner's finding that the Library's regulations could support adverse action based on the plaintiff's failure to comply with the FFD process, but disagreed with the hearing examiner's conclusion that the plaintiff was not a threat to the workplace. *Id.* ¶ *55.* Ultimately, the Deputy Librarian of Congress upheld the plaintiff's removal from Library employment. *Id.* Subsequently, the plaintiff filed the instant suit. On December 8, 2004, the defendants filed a motion for summary judgment on all counts. That same day, the plaintiff filed her own motion for summary judgment on her Fifth Amendment due process arguments. The court now turns to those motions.

## III. ANALYSIS

### A. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. *56(c); see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Diamond v. Atwood,* 43 F.3d 1538, 1540 (D.C. Cir. *1995).* To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution

could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

**B. Legal Standard for Sex Discrimination**

To prevail on a claim of sex discrimination under Title VII, a plaintiff must follow a three-part burden-shifting analysis generally known as the *McDonnell Douglas* framework. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). The Supreme Court explained the framework as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of

> discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection" . . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination . . . . The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

*Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248,252-53 (1981) (internal citations omitted) (quoting *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

To establish a prima facie case of sex discrimination, the plaintiff must show that (1) he is a member of a protected class; (2) he was similarly situated to an employee who was not a member of the protected class; and (3) he and the similarly situated employee were treated disparately. *Holbrook v. Reno*, 196 F.3d *255*, 261 (D.C. Cir. 1999). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. If the plaintiff establishes a prima facie case, a presumption then arises that the employer unlawfully discriminated against the employee. *Id.* at 254. To rebut this presumption, the employer must articulate a legitimate, non-discriminatory reason for its action. *Id.* The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* Rather, "[t]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

If the employer successfully presents a legitimate, non-discriminatory reason for its actions, "the *McDonnell Douglas* framework with its presumptions and burdens disappears, and the sole remaining issue is discrimination *vel non*." *Lathram*, 336 F.3d at 1088 (internal citations omitted). At this point, to survive summary judgment, the plaintiff "must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Id.* (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (en banc). The court must consider whether the jury could infer discrimination from (1) the plaintiff's *prima facie* case, (2) any evidence the plaintiff presents to attack the employer's proffered explanation, and (3) any further evidence of discrimination that may be available to the plaintiff. *Waterhouse v. District of Columbia*, 298 F.3d 989, 992-93 (D.C. Cir. 2002) (quoting *Aka*, 156 F.3d at 1289). The plaintiff need not present evidence in each of these categories in order to avoid summary judgment. *Aka*, *156* F.3d at 1289. Rather, the court should assess the plaintiff's challenge to the employer's explanation in light of the total circumstances of the case. *Id.* at 1291.

### C. A Reasonable Juror Could Not Conclude That the Plaintiff's Suspension or Termination Was Based on a Discriminatory Reason

#### 1. The Plaintiff Establishes a Prima Facie Case for Sex Discrimination

The defendants first argue that the plaintiff cannot establish a prima facie case of sex discrimination because she cannot identify a similarly situated employee. Defs.' Mot. at 16. The plaintiff responds by arguing that identifying a similarly situated employee is not an absolute requirement to demonstrate a prima facie case of sex discrimination. The plaintiff is correct. Although courts frequently look to see if a plaintiff satisfies the *Holbrook* factors to establish a prima facie case for sex discrimination, the Supreme Court noted

that the *McDonnell Douglas* framework is not intended to be "rigid, mechanized or ritualistic" and that "the precise requirements of a prima facie case can vary depending on the context." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) (internal quotation omitted). Accordingly, the D.C. Circuit has articulated an alternative formulation of a Title VII prima facie case. A plaintiff must establish that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Stella v. Mineta*, 284 F.3d 135, *145* (D.C. Cir. 2002). Of course, one common way to demonstrate that an unfavorable action gives rise to an inference of discrimination is by demonstrating that a similarly-situated individual was treated differently. However, *Stella* makes clear that pointing to a similarly-situated individual that was treated differently is not the *only* way to establish a prima facie case for sex discrimination. *Id.*

Here, the plaintiff points to evidence that out of the 37 psychiatric FFD examinations the Library ordered between 1991 and 1995, the Library sought removal, suspension or enforced leave in seven of the cases. Pl's Opp'n at 16. Of these seven cases, six involved females. *Id*. The plaintiff also notes that the Library stayed nine cases in which it sought FFD examinations. In those cases, eight of the nine employees were male. *Id.* The defendant does not contest those facts. *See generally* Defs.' Reply. The court concludes that in light of this evidence, the plaintiff has carried her burden of producing an inference of discrimination. *Burdine*, 450 U.S. at 253. Consequently, the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for its actions. *Burdine*, 450 U.S. at 253.

**2. The Defendants Articulate Legitimate, Non-discriminatory Reasons for Their Actions**

The defendants here easily carry their burden. The defendants have provided extensive evidence that the plaintiff

either was, or was perceived to be, a threat to workplace safety and was insubordinate. First, the plaintiff made repeated threats against co-workers. *See, e.g.* Defs.' Exs. 7 (memorializing Dr. Charles' observation of the plaintiff's threatening gesture with her car); 10 (memorandum from the Dispute Resolution Center recounting the plaintiff's threats to cut her supervisor's head off and "angry," "hostile" and "hysterical" behavior in the Dispute Resolution Center); 11 (summarizing a meeting where several Library employees described the plaintiff's anger and threats toward supervisors); 25 (memorializing Dr. Charles and Dr. Burbach's opinion that the plaintiff's threats to harm others and emotional instability constituted a risk to the workplace); Weiss Dep. at 56 (noting the plaintiff's stated desire to cut her supervisor's head off and put it on a plate); Wood Dep. (stating that "I think I said John's head should be on a platter"). Furthermore, it is clear that the plaintiff was insubordinate by repeatedly thwarting and delaying FFD examinations by making direct or veiled threats of litigation against the examining physician. *See, e.g.*, Allen Dep. at 35-36; Fiester Dep. at 36-37. To state the obvious, threats of violence and insubordination both constitute legitimate, non-discriminatory reasons for suspending or terminating an employee. *Clark v. Runyon*, 218 F.3d *915*, 919 (8th Cir. 2000) (threats); *Smith v. Leggett Wire Co*, 220 F.3d 752, 759 (6th Cir. 2000) (threats); *Smith v. New York Times*, 955 F. Supp. *558*, 560 (D.S.C. 1996) (threats), *aff'd*, 107 F.3d 867 (4th Cir. 1997); *Williams v. Verizon Wash., DC, Inc.*, 266 F. Supp. 2d 107, 122 (D.D.C. 2003) (insubordination); *Richard v. Bell Atlantic Corp.*, 164 F. Supp. 2d 10, 22 (D.D.C. 2001) (insubordination).

**3. The Plaintiff Fails to Demonstrate That the Adverse Employment Action Was Made for a Discriminatory Reason**

Because the defendants have met their burden of producing a legitimate, nondiscriminatory reason for their

actions, the plaintiff must present evidence demonstrating that the adverse employment action was made for a discriminatory reason. *Lathram*, 336 F.3d at 1088. The plaintiff fails to do so. As noted, once the defendant meets its burden, the court must consider whether the jury could infer discrimination from (1) the plaintiff's prima facie case, (2) any evidence the plaintiff presents to attack the employer's proffered explanation, and (3) any further evidence of discrimination that may be available to the plaintiff. *Waterhouse*, 298 F.3d at 992-93.

As an initial matter, the plaintiff's prima facie case is not compelling, in this case, in light of the strong evidence of legitimate reasons for termination and the absence of any countervailing evidence, the limited sample size that the plaintiff relies on to establish her prima facie case is not persuasive. *Pollis v. New School For Social Research*, 132 F.3d 115, 121 (2d Cir. 1997) (rejecting an inference of discrimination drawn from a statistical analysis with a sample size of eight, and stating that "[t]he smaller the sample, the greater likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it); *Simpson v. Midland-Cross Corp.* 823 F.2d 937, 943 n.7 (6th Cir. 1987) (noting that many courts "recogniz[e] that small statistical samples provide little or no probative force to show discrimination"); *Coble v. Hot Springs Sch. Dist. No.* 6, 682 F.2d 721,733 (8th Cir. 1982) (concluding that 15 decisions over 8 years was an insufficient sample size to infer sex discrimination).

Next, the plaintiff's attempts to discredit the Library's proffered explanation fail. The plaintiff first alleges that she was treated less favorably than similarly-situated males. Because no males in her department were forced to undertake FFD exams and some males under the same supervisor were promoted ahead of her, the plaintiff argues that these facts demonstrate the defendants discriminated against her. Pl.'s

Opp'n at 17-18. To show that she was similarly-situated to male employees in her department, the plaintiff must demonstrate that "all relevant aspects of her employment situation were nearly identical" to those ofthemaie employees. *Neuren v. Adduci, Mastriani, Meeks & Schill,* 43 F.3d 1507, 1514 (D.C. Cir. 1995) (internal quotation omitted). Here, the plaintiff fails to demonstrate that any of the males in her department made threats against co-workers or impeded efforts to conduct FFD examinations, but were not suspended or terminated. The plaintiff does not unequivocally deny that, for instance, she made a threat to cut off her supervisor's head. Rather, the plaintiff simply states that she couldn't really remember what she said or that the threats weren't real threats because she was "just blowing off steam" or using an "expression." Pl.'s Opp'n, Ex. 3 at 607. Similarly, she cannot deny that she told examining physicians that they were violating her rights or that a FFD examination was "psychological rape." Pl.'s Stat. ¶ 34. Instead, the plaintiff simply states that she was entitled to voice her opinion. Because the plaintiff cannot point to any similarly situated males that threatened bodily injury against a supervisor, or prevented FFD exams from going forward by making veiled threats of litigation against the treating physician, she cannot demonstrate that similarly-situated male employees were treated more favorably.

Finally, the plaintiff attempts to demonstrate that the defendants reasons for suspending and terminating her were a pretext for discrimination. The plaintiff alleges that she was cooperative in the FFD examination process, the Library violated its own regulations by forcing her to submit to a FFD and the Library based its termination decision on a FFD that the Library had previously discounted and rejected. Pl.'s Opp'n at 26-36. However, "[o]nce the employer has articulated a non-discriminatory explanation for its action. . . the issue is not the correctness or desirability of the reasons offered. . . but whether the employer honestly believes the

reasons is offers." *Fischbach v. Dist. Golunthia Dep't of Corrs.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (internal quotations omitted).

As noted, it is clear that the plaintiff thwarted and delayed her FFD examinations by making both overt and veiled threats of litigation to the physicians that examined her. The fact that the plaintiff personally believes that she did not interfere in the FFD process is of no moment. *Tolson v. James*, 315 F. Supp. 2d 110, 116 (D.D.C. 2004) (noting that a plaintiff's subjective view of her own job performance is irrelevant in establishing pretext). It is also irrelevant that the plaintiff disagreed with the wisdom, necessity or justification for continued psychological testing after her initial evaluation by Dr. Allen. *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994) (holding that "[i]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason"). The defendants have consistently noted the plaintiff's interference with the FFD process as insubordination justifying suspension and termination. *See, e.g.*, Defs.' Mot., Exs. 23, 24, 27, 31, 38, 42.

In the same vein, the plaintiff asserts that "[the Library's proffered reasons for termination should also be viewed as pretextual because it wrongfully based the termination on a FFD determination which the Library had previously discounted and rejected." Specifically, the plaintiff points to the Library's statement that Hiram Davis' August 16, 1996, decision "effectively superseded the Library's previous determination that [the plaintiff] was not fit for duty.]" Pl.'s Opp'n at 35. However, the court fails to see why the fact that Mr. Davis reinstituted the FFD process would preclude the Library from again reaching the conclusion that the plaintiff was unfit for duty. In fact, even though Mr. Davis reinstated the FFD process, he specifically noted that "[i]nformation contained in the record of this

matter does raise a serious question regarding your fitness and the possibility that your return to duty could result in a threat to safety and/or a disruption of library operations. It is noted also in this regard that you openly refused to deal with Library representatives in their attempts to communicate with you during your fitness-for-duty examination." Defs.' Mot., Ex. 31. Clearly, the reinstatement of the FFD process was not, as the plaintiff seems to believe, a determination that the plaintiff was not a threat or that she was cooperative during the FFD process.

The plaintiff argues that the only "new" information regarding her fitness for duty was from her own expert witness, Dr. Stephen Rojcewicz, who indicated that the plaintiff did not constitute an unacceptable risk in the workplace. Pl.'s Opp'n at 35-36. But, even if the plaintiff is correct in that she did not constitute an unacceptable risk in the workplace, "it is not enough [to demonstrate pretext] for a plaintiff to show that his employer's explanation was based on an inaccurate assessment of its employee's performance." *Olsen v. Mashall & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001); *George v. Leavitt*, 2005 WL 1148042, at *8 (D.C. Cir. May 17, 2005) (noting that even if a plaintiff demonstrates that an employer's reason for an action is proven false, she has not necessarily proven pretext "because an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false"). Again, just because the Library did not receive further information supporting the conclusion that the plaintiff was a risk to the work place, that does not preclude the Library from reaching the same conclusion it did in 1995.

Finally, the plaintiff argues that she has demonstrated pretext because the Library did not follow its own procedures concern FFD examination when it offered her the opportunity to reengage in the FFD process in 1998. Specifically, the plaintiff alleges that the Library amended its regulations

concerning when a FFD exam could be ordered, and that under the new regulations, ordering the plaintiff to undergo a psychiatric exam was improper. Pl.'s Opp'n at 32. The defendants respond by noting that even if a FFD exam is voluntary under the current regulations, the Library is not precluded from taking action against an employee who exhibits the type of conduct the plaintiff engaged in. Defs.' Reply at 14.

Even if the Library's regulations did not permit it to order the plaintiff to take a psychiatric exam in 1998, "[a]n employer's failure to follow its own regulations and procedures, alone, may not be sufficient to support the conclusion that its explanation for the challenged employment action is pretextual." *Fischbach*, 86 F.3d at 1183 (internal quotation omitted). As explained above, the plaintiff presents no other credible evidence that the Library's motives were discriminatory. For instance, if the plaintiff could have pointed to a male employee who made threats and was uncooperative in the FFD process, but was not suspended or terminated, she may have rebutted the employer's proffered non-discriminatory reason for its actions. Similarly, if the plaintiff demonstrated that the Library fabricated the threats she voiced, that would also lend credence to her claim. However, at best, the plaintiff merely attempts to downplay the seriousness of her threats, characterizing them as "just blowing off steam" or "fantasies." Pl.' s Opp'n, Ex. 31. Contrasting the overwhelming evidence that her supervisors consistently took the plaintiff's threats seriously and that the plaintiff was insubordinate with the plaintiffs unsupported, bare allegations of discrimination, the court concludes that the plaintiff has failed to establish that "the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Accordingly, the court grants the defendants' motion for summary judgment on the plaintiff's sex discrimination claim.

**D. The Plaintiff Cannot Establish a Claim for Retaliation**

The plaintiff next claims that the defendants retaliated against her for engaging in protected activity. The plaintiff notes that after she filed her first EEO complaint, the Library subjected her to FFD exams and then proposed her removal after subsequent EEO complaints. Pl.'s Opp'n at 19-20. The *McDonnell Douglas* framework also applies to the plaintiff's retaliation claims. *Lathram*, 336 F.3d at 1089 n.3. Therefore, even assuming *arguendo* that the plaintiff established a prima facie case for retaliation, her claim ultimately fails for the same reasons her sex discrimination claim fails. The plaintiff presents no new, independent evidence as to why the court should view the employer's proffered reasons for suspending and terminating her as pretextual. Thus, the defendants are also entitled to summary judgment on the plaintiff's retaliation claims. *Burdine*, 450 U.S. at 256.

**E. The Plaintiff Cannot Establish a Due Process Claim**

The plaintiff next argues that the defendants violated her due process rights when they indefinitely suspended her and fired her. Pl.'s Mot. at 1. At the very outset, the plaintiff fails to establish a claim. To prevail on a due process claim, the plaintiff "must first show that the interest he asserts is a constitutionally protected property interest." *Block v. Powell*, 348 F.3d 1060, 1068 (D.C. Cir. 2003). Moreover, "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Despite what the plaintiff may believe, the mere fact that she is employed by the federal government does not confer a Constitutionally protected property interest in her employment. *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cit. 1988) (concluding that an attorney did not have a property interest in federal employment). Rather, "[s]uch interests can only be created by understandings, statutes or rules that secure certain

benefits and that support claims of entitlement to those benefits." *Id.* In her motion for summary judgment, the plaintiff simply asserts that "[a]s a federal employee, Plaintiff had a property interest in her employment[.]" Pl.'s Mot. at 7. Conspicuously absent is any discussion, analysis or citation of any legal authority that would establish a protected property rest in the plaintiff's employment. *Id.*; *Garrow*, 856 F2d at 207 (noting the plaintiff's failure to point to any source that would establish property rights in his federal employment). In the plaintiff's opposition to the defendants' motion for summary judgment, the plaintiff does cite one case, *AFSCME Local 2477 v. Billington*, 740 F. Supp. 1, 4 (D.D.C. 1990), for the proposition that she had a property interest in her position at the Library of Congress. Pl.'s Opp'n at 36. It is true that the *AFSCME Local 2477* court operated on the assumption that Library of Congress employees have a property interest in their employment because the parties did not dispute that fact. *AFSCME Local 2477*, 740 F. Supp. at 4. It is also true that here, the defendants again failed to contest whether the plaintiff had a protected property interest in her employment. However, it is the plaintiff's burden to establish a property interest in continued employment. *Crull v. Sunderman*, 384 F.3d 453, 469 (7th Cit. 2004); *Watson v. Univ. Utah Med. Ctr.*, 75 F.3d 569, 578 (10th Cit. 1996); *Soeken v. Herman*, 35 F. Supp. 2d 99, 104-05 (D.D.C. 1999). Consequently, despite the defendant's failure to raise the issue, the court will not simply assume that a property interest exists. As noted, the plaintiff fails to present any facts or analysis as to why she has a property interest in her employment with the Library of Congress. Accordingly, the court dismisses the plaintiff's due process claims.

**F. The Plaintiff Cannot Establish a Violation of the Rehabilitation Act**

Finally, the plaintiff alleges that the defendants discriminated against her in violation of the ADA because they regarded her a having a mental disability. Compl. ¶ 47.

As an initial matter, the court notes that the ADA is inapplicable to federal employees. 42 U.S.C. § 12111 (5)(B)(i) (specifically excluding the United States as an "employer" covered by the ADA); *accord Calero-Cerezo v. Dep't of Justice*, 355 F.3d 6, 12 n. 1 (1st Cir. 2004); *Rivera v. Heyman*, 157 F.3d 101, 103 (2.d. Cir. 1998); *Woodruff v. Mineta*, 215 F. Supp. 2d 135, 138-39 (D.D.C. 2002).[2] Consequently, the court could simply dismiss the plaintiff's disability discrimination claim without further comment. However, because the Rehabilitation Act, which is the correct basis for a disability discrimination claim by a federal employee, expressly incorporates the standards for a claim under the ADA, the court goes on to the merits of the plaintiffs claim. 29 U.S.C. §§ 701 *et seq; Lester v. Natsios*, 290 F. Supp. 2d 11, 23 n.2 (D.D.C. 2003).[3]

The defendants argue that the plaintiff's suspension and termination stemmed from her insubordination and threatening behavior, not a perception that she suffered from a mental disability. Defs.' Mot. at 24. The plaintiff counters by pointing to the Library's March 17, 1995, Notice of Proposed Adverse Action in which the Library stated that "[i]t is proposed that you be removed from your position for reasons of disability... in light of the fitness determination, you are considered to be permanently disabled." Pl.'s Opp'n at 21 (quoting Defs.' Mot., Ex. 27). Despite the defendants' statement, the plaintiff argues that she is not actually disabled. Pl.'s Opp'n at 23. The Library discriminated against her,

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[2] While the Congressional Accountability Act ("CAA") makes the ADA applicable to the Legislative Branch, the CAA is inapplicable to Library employees. 2 U.S.C. § 1301(3); *accord Baker v. Library of Cong.*, 260 F. Supp. 2d 59, 64 (D.D.C. 2003).

[3] Additionally, "[b]ecause of the similarity between the ADA and the Rehabilitation Act, 'cases interpreting either are applicable and interchangeable.'" *Scarborough v. Natsios*, 190 F. Supp. 2d 5, 19 n.10 (D.D.C. 2002) (quoting *Gorinan v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998)).

argues the plaintiff, because it mistakenly regarded the plaintiff to be disabled and took adverse action against her because of the Library's inaccurate perception that she was disabled. *Id.*

What the plaintiff fails to recognize is that to succeed on her Rehabilitation Act claim, "it is not enough that the employer regarded [her] as somehow disabled; rather the plaintiff must show that the employer regarded [her] as disabled *within the meaning of the ADA.*" *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d. Cit. 1998) (emphasis in the original); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). A person is not disabled for the purposes of the ADA, and thus the Rehabilitation Act, unless the individual suffers from "a physical or mental impairment that substantially limits one or more of the major life activities[.]" 42 U.S.C. § 12102 (2). Thus, the plaintiff must demonstrate that the Library regarded her mental disability as one that substantially limited a major life activity. *Sutton*, 527 U.S. at 489 (noting that to be considered disabled within the meaning of the ADA when a plaintiff claims she is not actually disabled, the employer must believe that the plaintiff has a substantially limiting impairment); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cit. 1996) (stating that if a plaintiff has direct evidence that an employer relied on the presence of a disability as a reason for making an adverse employment decision, the plaintiff bears the burden of establishing that he or she is disabled).

Although the plaintiff does not clearly lay out her argument, it appears that the "major life activity" that she believes the defendant perceived her to have substantial limitations on is the ability to work. The Supreme Court has clearly held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiff allege they are unable to work in a broad class of jobs. . . one

must be precluded from more than one type of job, a specialized job or a particular job of choice." *Sutton*, 527 U.S. at 491-92. Thus, the plaintiff must present evidence that the Library regarded the defendant as unable to work as an attorney generally, as opposed to the defendant being unable to work as an attorney in the Office of the General Counsel of the Library of Congress. *Id.*

The plaintiff presents no evidence that the Library considered her to be unable to work as an attorney. Rather, the entirety of the plaintiff's argument is that: (1) the defendants labeled her as disabled in their March 1995 Notice of Proposed Adverse Action; and (2) she is not actually disabled. Pl.'s Opp'n at 20-26. Of course, the plaintiff's evidence that she is not actually disabled is irrelevant if the defendants never considered her to be disabled within the meaning of the ADA. The evidence demonstrates that, to the extent the defendants considered the plaintiff mentally disabled due to emotional instability, her disability precluded her from working in the Library of Congress' General Counsel's Office, not as an attorney generally. Def.'s Mot., Ex. 27 at 3 (stating that "you have been found emotionally unfit *for duty as an Assistant General Counsel, GS-13*") (emphasis added). Moreover, the March 1995 Notice of Proposed Adverse Action – the only evidence that the plaintiff offers as evidence that the Library regarded her as disabled – was superseded by a 1998 Notice of Proposed Adverse Action. The 1998 Notice of Proposed Adverse Action did not make any mention of disability. *Compare* Defs.' Mot., Ex. 27 *with* Defs.' Mot., Ex. 31. The defendants' evidence indicates that it has consistently cited the plaintiff's threats against Dr. Sandra Charles, Bob Lincoln and John Kominski and her insubordination in thwarting the FFD process as reasons for her termination. *See*, e.g., Defs.' Mot. Ex. 7, 10, 11, 23, 27, 31, 33, 40, 42. Thus, to the extent the defendants characterized the plaintiff's emotional instability and insubordination as a "disability," the evidence amply

demonstrates that the defendants were specifically referring to her inability to work under the supervision of, and threatening behavior towards Bob Lincoln and John Kominski, her threatening behavior towards Dr. Sandra Charles, and her insubordinate attitude (as demonstrated by her active sabotage) regarding the FFD process. There are no allegations or evidence presented by the plaintiff that the Library viewed her as unable to work under the supervision of *any* employer or that the plaintiff was unable to comply with *any* directions from supervisors. Rather, it is clear that the defendants regarded her as unable to work in the *specific* job of the Assistant General Counsel in the Library of Congress due to her threats against *specific* supervisors and refusal to comply with *specific* directives. Accordingly, the plaintiff cannot prevail on her ADA claim. *Sutton*, 527 U.S. at 489.

## IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment and denies the plaintiff's motion for summary judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 10th day of June, 2005.

RICARDO M. URBINA
United States District Judge